

March 13, 2002

Via Electronic Filing

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **Application by Verizon New Jersey for Authorization
To Provide In Region InterLATA Services in the State
of New Jersey
FCC CC Docket No. 01-347**

Dear Mr. Caton:

The Division of the Ratepayer Advocate (“Ratepayer Advocate”) hereby submits this *ex parte* filing and comments in response to the Public Notice issued in this proceeding on March 8, 2002 (DA 02-580), as well recent filings identified in Attachment A hereto, including those of Verizon New Jersey, Inc. (“Verizon-NJ”). The Public Notice requests comments on whether the Final Unbundled Network Elements (“UNE”) Order¹ issued by the New Jersey Board of Public Utilities (“Board”) demonstrates that the New Jersey UNE rates fall within the reasonable range that a correct application of TELRIC principles would produce. It is the opinion of the Ratepayer Advocate that the recent filings in this instant proceeding raise substantive and procedural issues that require restarting the 90-day statutory period for Federal Communications Commission (“FCC” or “Commission”) review of Verizon-NJ’s Section 271 Application (“Application”). The Ratepayer

¹/ *I/M/O the Board’s Review of Unbundled Network Elements, Rates, Terms and Conditions of Bell Atlantic-New Jersey, Inc.*, Docket No. TO00060356, Decision and Order (Mar. 6, 2002) (hereinafter *Final UNE Order*).

Advocate submits that the recent *ex parte* filings and the Board's Final UNE Order demonstrate conclusively that Verizon-NJ's Application, as originally filed, did not include sufficient factual evidence necessary to determine compliance with the 14 point checklist and satisfaction of the public interest standard.

1. INTRODUCTION

For the reasons stated herein, the record in this proceeding now further evidences that the Application is incomplete at this time. The Ratepayer Advocate maintains its position that the Application was incomplete when originally filed, because Verizon-NJ was unable to show at that time that the Board's recurring and non-recurring rates were, in fact, TELRIC compliant;² such an

^{2/} As reflected in the Comments and Reply Comments of the Ratepayer Advocate, Verizon-NJ failed in its application to show that it is providing nondiscriminatory access to OSS, that it is providing UNEs at cost-based rates, and that as filed, its application is complete. Similarly, the Ratepayer Advocate noted that Verizon-NJ's application when filed was fatally incomplete because the new UNE rates had not been implemented, and Verizon-NJ would not begin billing CLECs the new rates "until after [the] FCC has issued its decision in the 271 proceeding." *See infra* note 27. Ratepayer Advocate Reply Comments at 20.

The Ratepayer Advocate also noted that according to the FCC, the complete-as-filed rule requires that the filing be complete at the time of filing and promises of future compliance are inadequate to satisfy a BOC's burden of proof when we cited to the FCC's previously stated position on this point:

[W]e find that a BOC's promises of *future* performance to address particular concerns

analysis would require a final UNE Order.³ Neither the recent release of the Board's Final UNE Order nor a letter from Verizon-NJ filed with the Board on March 12, 2002, assuring the Board of the company's implementation of the UNE rates, dispel the fact that the Application was not complete when filed.

2. Verizon-NJ filed its Application prior to the Board release of a final Order in the UNE proceeding.

raised by commenters have no probative value in demonstrating its *present* compliance with the requirements of 271. Paper promises do not, and cannot, satisfy a BOC's burden of proof. In order to gain in-region interLATA entry, a BOC must support its application with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior (emphasis added).

Ratepayer Advocate Reply Comments at 20 (footnotes omitted).

³/ *I/M/O the Board's Review of Unbundled Network Elements, Rates, Terms and Conditions of Bell Atlantic-New Jersey, Inc.*, Docket No. TO00060356, Summary Order of Approval (December 17, 2001). The Summary Order set forth the established UNE rates. Because the Summary Order was not intended as the final order in the case it did not explain the Board's reasoning underlying the published UNE rates.

3. Furthermore, our cursory review of the Board's Final UNE Order reveals potential serious and substantial flaws in the application of the TELRIC methodology.
4. Verizon-NJ based the TELRIC compliance of its UNE rates on New York rates that are no longer in effect.
5. Verizon-NJ "game[d] the process"⁴ by relying upon New York rates which an Administrative Law Judge had determined should be lowered substantially,⁵ and filed its application in New Jersey before a Final UNE Order was issued.
6. The New York switching rates, as compared to the switching rates in the Board's Summary Order are substantially lower, and until recently, Verizon-NJ offered no benchmark analysis other than an analysis for the superseded New York rates.
7. The New York hot cut rate relied upon by Verizon-NJ as evidence of its compliance with TELRIC is no longer in effect, and Verizon-NJ has yet to reduce its New Jersey hot cut rate to reflect the reduced New York hot cut rate.
8. The Board, the Department of Justice, and others have had no opportunity to consider the effects of the new New York switching rates and the hot cut rate reduction agreed to by Verizon in New York as part of this New Jersey proceeding.

⁴/ *Application of Verizon New England Inc., Bell Atlantic Communications Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance (d/b/a Verizon Enterprise Solutions), Verizon Global Network Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Rhode Island*, CC Docket No. 01-324, FCC 02-63, Memorandum Opinion and Order (rel. February 22, 2002) (hereinafter "Rhode Island Order").

⁵/ New York Public Service Commission, *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Case 98-C-1357, Order on Unbundled Network Element Rates (rel. Jan. 28, 2002) (hereinafter "NY UNE Order") The New York Commission based its order on an Administrative Law Judge's (ALJ's) Recommended Decision released on May 16, 2001 and Supplemental Recommended Decision released on June 18, 2001.

Verizon-NJ's history also shows a disregard of the effect of non-TELRIC compliant rates on the public interest. Specifically, for more than four years Verizon-NJ insisted that CLECs accept the 1997 UNE rates set by the Board which were overturned as being arbitrary, capricious and an

abuse of discretion by the Federal District Court in June 2000.⁶ Verizon-NJ ignored the public interest by its steadfast refusal prior to filing its Section 271 Application to implement voluntary reductions in UNE rates, except for the discounts offered under the Bell Atlantic/GTE merger conditions agreed to by Verizon. This lack of consideration for the public interest is demonstrated further by not offering to reduce its switching and hot cut rates to conform to the rates in New York.⁷

II. THE LACK OF A COMPLETE RECORD AT THE TIME OF FILING AT THE FCC WARRANTS DISMISSAL OF VERIZON NEW JERSEY'S SECTION 271 APPLICATION, OR, ALTERNATIVELY, A RESTARTING OF THE 90-DAY REVIEW PERIOD.

A. The "Complete-as-Filed" Rule Has Been Violated in this Proceeding

The FCC adopted the complete-as-filed rule, which provides that when an applicant files new information after the comment date, the FCC reserves the right to restart the 90-day review

^{6/} AT&T Communications of New Jersey et al. v. Bell Atlantic-New Jersey, Inc. et al., Civ. No. 97-5762 (KSH); MCI Telecommunications Corp., et al. v. Bell Atlantic - New Jersey, Inc. et al., Civ. No. 98-0109 (KSH) (Jun. 6, 2000). *See, also*, the Verizon-NJ compliance filing to the Board dated February 1, 2000; that filing shows that every interconnection agreement has the 1997 UNE rates set by the Board; a copy of that filing is Exhibit D to the Affidavit of Christopher J. White, Esq. submitted in support of the New Jersey Division of the Ratepayer Advocate's petition for declaratory ruling seeking preemption, dated March 3, 2000, CC Docket No. 00-49).

^{7/} The Ratepayer Advocate acknowledges that certain reductions were agreed to as part of the Bell Atlantic/GTE merger conditions, and does not consider these voluntary reductions.

period or to accord such information no weight in determining Section 271 compliance.⁸ This rule affords interested parties a fair opportunity to comment on the Bell Operating Company's ("BOC's") application, ensures that the Attorney General and the state commission can fulfill their statutory consultative roles, and affords the FCC adequate time to evaluate the record.⁹ The FCC has consistently stated that it may waive its procedural rules, "if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."¹⁰

^{8/} See *Rhode Island Order* at para 7, see also *I/M/O Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, FCC 01-29, Memorandum Opinion and Order at para. 21, (rel. Jan. 22, 2001) (hereinafter "*KS/OK Order*").

^{9/} *Rhode Island Order* at para. 7.

^{10/} *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, (D.C. Cir. 1969); see also 47 U.S.C. § 154(j); 47 C.F.R. § 1.3.

In the Rhode Island Section 271 proceeding, the FCC waived the complete-as-filed requirement on its own motion when it considered the rate reductions filed by Verizon-NJ on day 80 of the 90-day review period. Specifically, the FCC found “that the special circumstances before us here warrant a deviation from the general rules for consideration of late-filed information or developments that take place during the application review period.”¹¹ In particular, according to the FCC, the interest designed to be protected by the rule was found to be not affected by the FCC’s consideration of the late-filed rate reductions. However, the FCC noted that, absent special circumstances, it would continue to enforce the complete-as-filed rules in future Section 271 applications, so as to ensure a fair and orderly process for the consideration of Section 271.¹²

The recent *ex parte* filings demonstrate that this procedural rule has not been satisfied and, as will be discussed below, no unique circumstances exist to permit waiver of this rule. A waiver of the rule - which is not warranted in this case - will not remove the shortcomings in the record. The record as to whether Verizon-NJ’s New Jersey recurring and non-recurring rates, including, but not limited to switching rates, hot cut rates, and other non-recurring rates are TELRIC compliant was insufficient when filed and remains so today.

B. UNE Pricing and the FCC’s Benchmark Analysis

Section 252(d)(1) of the Telecommunications Act of 1996¹³ requires that state determinations regarding the rates, terms, and conditions for UNEs be cost-based and nondiscriminatory, and allow the carrier to earn a reasonable profit. The Commission’s pricing rules require, among other things, that an incumbent LEC provide UNEs based on the TELRIC

¹¹/ *Rhode Island Order* at para. 8.

¹²/ *Id.*

¹³/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (“1996 Act”). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as “the Act,” and all citations to sections of the Act will be to the Act as it is codified in the United States Code.

pricing methodology.¹⁴ In order to approve Verizon-NJ Section 271 applications, the FCC must conclude that Verizon-NJ's UNE rates fall within the reasonable range that correct application of TELRIC principles would produce. The FCC lacks an adequate record to make this determination when a state commission does not apply TELRIC principles or does so improperly (*i.e.*, the state commission made a major methodological mistake or used an incorrect input or several smaller mistakes or incorrect inputs that collectively could render rates outside the reasonable range that TELRIC would permit).¹⁵

When faced with an inadequate record, the FCC applies its benchmark analysis test. Under that test, the FCC compares the submitted rates with those of states in which Section 271 applications have been approved in order to determine whether the rates fall within the range that a reasonable TELRIC-based rate proceeding would produce. As such, the FCC considers:

- (a) whether the two states have a common BOC;
- (b) whether the two states have geographic similarities;
- (c) whether the two states have similar, although not necessarily identical, rate structures for comparison purposes; and

¹⁴/ *Rhode Island Order* at para. 20.

¹⁵/ *Rhode Island Order* at para. 38.

- (d) whether the Commission has already found the rates in the comparison state to be TELRIC-compliant.¹⁶

¹⁶/ *Id.* at para. 38, n. 107 (citing to other Section 271 proceedings where the benchmark analysis was applied).

The FCC outlined this test when it approved Southwestern Bell Corporation's application in Arkansas and Missouri.¹⁷ The AK/MO Order outlines the methodology the FCC employs to determine whether recurring and non-recurring rates comply with checklist item 2.¹⁸ For checklist item 2, the FCC uses a six-step process. First, the FCC applies its TELRIC rules.¹⁹ Second, the FCC determines whether the rates fall within "a reasonable range of what TELRIC-based ratemaking would produce" by using a comparison between previously approved rates in neighboring states or in other states in which Section 271 applications have been approved.²⁰ Third, the FCC conducts the comparison when the two states have a common BOC; the two states have geographic similarities; the two states have similar, although not necessarily identical, rate structures for comparison purposes; and the Commission has found the rates in the comparison state to be reasonable.²¹ Fourth, the FCC uses its USF cost model as a basis for determining whether cost differences between states demonstrates that difference in rates are consistent with TELRIC.²² Fifth, the FCC uses the same state for comparison purposes for recurring and non-recurring rates, if questions are raised over the TELRIC compliance of both recurring and non-recurring rates in a Section 271 application.²³ Sixth, the FCC will not ascribe a negative inference to the submitted UNE rates if a BOC reduces those rates voluntarily or in response to state commission directive.

The FCC made two clarifications to its benchmark analysis rules in its *Rhode Island Order*. Although the FCC stated that for purposes of its Rhode Island application it would rely upon its benchmark analysis by using New York UNE rates, the FCC indicated that in future proceedings, Verizon-NJ and other BOCs would be free to "rely upon benchmark comparisons to rates in other appropriate, Section 271 approved states. . . as evidence that rates in the applicant state satisfy

¹⁷/ *I/M/O Joint Application by SBC. Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri*, CC Docket No. 01-194, FCC 01-338, Memorandum Opinion and Order at paras. 117-118 (rel. Nov. 16, 2001) (hereinafter "AK/MO Order").

¹⁸/ See AK/MO Order at paras. 48 -77.

¹⁹/ AK/MO Order at para. 48.

²⁰/ *Id.* at paras. 52, 56.

²¹/ *Id.* at para. 56.

²²/ *Id.* at para. 57. If the percentage difference between's the applicant's state rate and the benchmark state's rates does not exceed the percentage difference between the applicant's state costs and the benchmark state's costs, as predicted by the USF model, then, the applicant has mt its burden to show that its rates are TELRIC-compliant. See *AK/MO Order* at para. 57, n. 160 (providing example of the USF analysis).

²³/ *Id.* at para. 58. This prevents a BOC from choosing for its comparisons the higher approved rates for both loop and non-loop UNEs.

checklist item 2.”²⁴ The FCC also clarified that in analyzing recurring non-loop rates that it combines per-minute switching with other non-loop rates such as port, signaling, and transport rates.

These clarifications do not apply to Verizon-NJ’s Section 271 Application in New Jersey since the FCC only applies rules in effect at the time of filing of an application.²⁵ The New York rates relied upon by Verizon-NJ in its New Jersey filing are no longer available for use as a benchmark. In both the *Massachusetts Order* at paras. 29, 30 and in the *Rhode Island Order* at para. 44, the FCC

²⁴/ *Rhode Island Order* at para. 39.

²⁵/ See *I/M/O Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York: Memorandum Decision and Order*, CC Docket No. 99-295, at para 31 (rel. Dec. 22, 1999) (“*New York Order*”). It is the position of the Ratepayer Advocate that these clarifications would not apply to this instant proceeding.

acknowledged that Verizon-NJ might be precluded from relying on New York as a benchmark comparison (for superseded switching rates).²⁶

²⁶ *I/M/O Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, FCC 01-130, Memorandum Opinion and Order at paras. 29-30, (rel. April 16, 2001) (hereinafter “*Massachusetts Order*”); *Rhode Island Order* at para. 44. Specifically, in Rhode Island, the FCC articulated four reasons for its decision to use the new New York rates as a benchmark. They are:

First, we rely on our previous conclusion that the New York Commission had conducted a TELRIC compliant proceeding when it set Bell Atlantic’s original UNE rates and our affirmative finding that the resulting rates fell within a reasonable TELRIC range – a finding affirmed by the D.C. Circuit. Second, we rely on the fact that, in a proceeding that spanned two years, included nearly a dozen parties, and generated almost 5000 pages of transcript, the New York Commission specifically addressed, among numerous TELRIC questions, the precise issue that was heavily debated in our initial consideration of Verizon’s superseded New York rates. Third, we rely on the fact that no commenter has asserted, or submitted any evidence to indicate, that when the New York Commission adopted the new New York rates, it violated “basic TELRIC principles [or made] clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce.” In fact, to the contrary, commenters asserted that the new New York rates should serve as a benchmark in this proceeding. Finally, we rely on the fact that the new New York rates are both lower and more in line with the rates we have approved in considering other Section 271 applications.

Rhode Island Order at para. 53.

C. Disparities in Certain Recurring and Non-Recurring Rates as Set Forth in the Board's Final UNE Order Call into Question Whether Those Rates are TELRIC Compliant.

As the *ex parte* filings show, the existing record is simply inadequate to make the necessary findings required to determine Verizon-NJ's satisfaction of the Section 271 checklist in so far as checklist item 2. Verizon-NJ and the Board have filed additional evidence in hopes of supplementing the record in order to show that Verizon-NJ's recurring and non-recurring UNE rates are TELRIC compliant and its OSS is nondiscriminatory. On March 8, 2002, the Board filed its Final UNE Order, which, at over 280 (two-hundred eighty) pages, is simply voluminous. To the extent the *ex parte* filings are intended to supplement the record, the Ratepayer Advocate submits that waivers of the complete-as-filed rule are required to entertain these filings, and that additional public notice is required so that parties can comment on the effects of the recently released New York UNE rates and, in particular, the lower hot cut rate.

The record shows that at the time of Verizon-NJ's application, a standard TELRIC analysis was not possible. The benchmark analysis offered by Verizon-NJ in its application was predicated on New York rates that have been superseded.²⁷ Even a cursory examination of the Board's Final UNE Order shows that the recurring and non-recurring rates, including the hot cut rate, are fundamentally flawed. The Board also acknowledges that the cost drivers for non-recurring rates are labor rates and work times,²⁸ and recognized the concerns raised by the Ratepayer Advocate and others that (a) the work times offered by Verizon-NJ are not based upon forward-looking surveys, (b) the surveys included outliers, (c) the surveys have upward bias, and (d) the surveys utilized subjective estimates of work times.²⁹ All of these deficiencies contribute in our opinion to the conclusion that the work times are not current, complete, or accurate for purposes of setting non-recurring rates. The Board clearly stated that the surveys were "biased, arbitrary, and unreliable."³⁰ The Board nevertheless proceeded to set final and permanent non-recurring rates based upon

²⁷/ Verizon's application as filed and the declarations submitted in support of the application show that Verizon-NJ relies upon New York rates, processes and procedures. See Garzillo/Prosini Decl. at para. 45 (stating that New York is an appropriate benchmark); Garzillo/Prosini Decl. at paras. 42-43 (comparing New Jersey unbundled loop rates to New York rates); Garzillo/Prosini at para. 44 (comparing New Jersey switching rates to New York rates); Verizon-NJ's 271 application at para. 98 (acknowledging that New York rates are under review); Verizon-NJ's 271 application at para. 14 and Mclean/Wierzbicki/Webster Decl. at para. 7 (stating that Verizon-NJ has a common set of wholesale interfaces across the entire footprint which includes New York and New Jersey).

²⁸/ See Board's Final UNE Order at 155, 166, 167.

²⁹/ *Id.* at 136-38, 155-57

³⁰/ *Id.* at 158 and 166-67 (stating that Board agrees with the Ratepayer Advocate).

unverifiable reductions in work times. The Board's unilateral reductions to compensate for these deficiencies is inadequate and should not be relied upon by the FCC.³¹

1. Hot Cut Rates

The hot cut rate reductions offered by Verizon in New York, where the hot cut rates are similar to those in New Jersey, undercut the Board's work time adjustments in New Jersey for hot cuts; the work time in New York and New Jersey should be similar. As a result, the hot cut reduction in New York calls into question the hot cut determination in New Jersey. Work times are

³¹/ The Ratepayer Advocate would be less concerned about the Board's approach if the Board had set interim non-recurring rates, subject to refund, pending further proceedings to determine work time through time and motion studies, audit of work orders, or cross-tracking. But, the Board's action in setting permanent non-recurring rates is both arbitrary, unreliable, and inconsistent with reasoned decision making. *See New York Order* at paras. 257-61.

one of a few non fixed variable factors.³² The main cost drivers for non-recurring rates are labor rates and work times. Labor rates are fixed. Therefore, the reduction in the New York hot cut rate must be predicated in substantial part upon reducing the work times, a variable factor. The work times used in derivation of the New Jersey hot cut rate set by the Board in the Final UNE Order is inconsistent with the new \$35.00 hot cut rate in New York. The most obvious cost driver to explain the difference in rates is work times. Differences in labor rates will not account for the price difference. The Ratepayer Advocate submits that similiar errors exist in all the work times adjusted by the Board because the only reliable, verifiable, and auditable method for determining work times is to use time and motion studies coupled with forward looking assumptions.³³ Yet, this was not done.

2. Switching Rates

Another example of the misapplication of TELRIC by the Board is the setting of local switching rates. As the following table demonstrates, Verizon-NJ's switching rates are substantially higher than those in effect in Pennsylvania, New York, and Rhode Island. The Ratepayer Advocate

^{32/} Another non-fixed variable factor is the amortization period. The Board did not address this with respect to hot cut rates. The amortization input factor is dependent upon what is within the acceptable range of inputs for an amortization factor under TELRIC. The proper time horizon for TELRIC studies was a hotly contested issue before the Board. This is an area for which a response is not possible within the limited time afforded parties to comment.

^{33/} The Ratepayer Advocate established this point during cross-examination of Terry L. Murray and Joseph P. Riolo, witnesses for COVAD Communications. On cross-examination, both witnesses concurred that the surveys used by Verizon-NJ were mere estimates, and that the more reliable method of determining work-times is through the use of time and motion studies, audits of work orders, or cost tracking. *See I/M/O the Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic-New Jersey, Inc.*, New Jersey Board of Public Utilities Docket No. TO00060356, Transcript of Hearing at 1955-1961 (Dec. 21, 2000), Attachment B. See, also, Verizon-NJ discovery responses, Attachment C, hereto.

submits that the Board's improper reliance on the non-TELRIC compliant input for busy hours contributes to the disparity in rates. Verizon-NJ offered 251 days as the input for busy hours calculation, and the Board accepted that input. In New York, the state commission accepted the Administrative Law Judge's recommendation of 308 days as being the TELRIC compliant input.³⁴ If 308 days are used, then the switching rates would be reduced substantially, and would be more consistent with the New York switching rates.³⁵

³⁴/ *NY UNE Order at 34.*

³⁵/ *See Board Final UNE Order at 121, 122.*

Comparison of Local Switching Rates

State	Originating Rate (MOU)	Terminating Rate (MOU)
New Jersey	\$0.002772	\$0.002508
New York ³⁶	\$0.001147	\$0.001111
Pennsylvania	\$0.001802	\$0.001615
Rhode Island ³⁷	\$0.001358	\$0.001192

The Board's original UNE order was deemed the result of arbitrary and capricious rulemaking when the Board substituted arbitrarily a 60/40 split in UNE inputs. The arbitrary substitution of busy day inputs by the Board is substantively no different, and casts question on the Final UNE Order.

^{36/} The superseded local switching rates in New York were \$0.003150 per minutes of use. The old rates were not deaveraged between originating and terminating. Instead, the old rates were usage based rates and time-of-day sensitive (day, evening, night). See New York Public Service Commission, *Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon and to Investigate the Future Regulatory Framework; Proceeding on Motion of the Commission to Examine Rates for Unbundled Network Elements*, Case Nos. 00-C-1945, 98-C-1357, Order Instituting Verizon Incentive Plan, Appendix A (Feb. 27, 2002).

^{37/} Prior to the voluntary reduction of local switching rates by Verizon-Rhode Island to reflect New York's lower UNE rates, local switching rates in Rhode Island were \$0.002921 for originating traffic and \$0.002563 for terminating traffic. See Rhode Island Public Utilities Commission, *Unbundled Local Switching And Analog Line Port Rates - Verizon Rhode Island's Section 271 Compliance Filing*, Docket No. 3363, Order, Appendix A (Feb. 21, 2002).

D. No Waivers are Warranted Under the Criteria Set Forth in the Rhode Island Order

The Ratepayer Advocate submits that there is no basis in law or fact that warrants the waiver of the complete-as-filed rule in this proceeding. The FCC reaffirmed the importance and necessity of its complete-as-filed rule in the *Rhode Island Order*.³⁸ Commissioner Copps stated in his separate statement that “the bar for a waiver will be set high.”³⁹ In that regard, the Ratepayer Advocate submits neither Verizon-NJ nor any other party in this proceeding have shown any unique circumstances which constitute the “special circumstances” that would justify a waiver.

³⁸/ *Rhode Island Order* at paras. 8-12.

³⁹/ *Rhode Island Order*, Separate Statement of Commission Michael J. Copps, at 2.

The Ratepayer Advocate submits that the record as of the filing and at this time show there exists no “special circumstances” to justify consideration of additional evidence offered in this proceeding. In the instant proceeding, Verizon-NJ gamed the process by prematurely filing its application without a Final UNE Order by the Board. There is no way to assess whether the Board’s UNE rates are TELRIC compliant based upon the Summary Order. The Final UNE Order was not issued by the Board until day 79 of the 90-day review period, is more than 280 pages, and affects a wide range of rates including every non-recurring rate offered by Verizon-NJ. The burden on the parties to assess whether the Board’s decisions in the Final UNE Order reflect the appropriate application of TELRIC principles is overwhelming, and the burden is exacerbated by the lack of time available to conduct a thorough and detailed analysis of the Final UNE Order. The Ratepayer Advocate did not receive a copy of the Public Notice until Monday, March 11, 2002. The Public Notice was not available on the FCC Web site until Monday, March 11, 2002. No party, including the Department of Justice, has had an opportunity prior to March 8, 2002 to comment on the Final UNE Order. A thorough and complete review, including benchmark analyses cannot be completed within the remaining time of the 90 day period for review of Verizon-NJ’s Section 271 application and therefore, the 90-day clock should be restarted.

The application as filed was incomplete and Verizon-NJ has failed to show that its UNE rates in New Jersey comport with rates derived from the proper application of TELRIC principles. In fact, serious and substantial issues exists as to the validity of the UNE rates adopted by the Board which can be demonstrated if sufficient time is afforded the parties to comment on the Board’s Final UNE Order. Verizon-NJ based its entire benchmark analysis on New York rates which were superseded. The new New York rates undercut the claims made by Verizon-NJ and the Board that the New Jersey rates fall within a reasonable range that a correct application of TELRIC principles would produce. Verizon-NJ was on notice that substantial reductions in the New York UNE rates were proposed by the Administrative Law Judge and that those reduced rates were under review by the New York Public Service Commission. Verizon-NJ was only at day 39 of the 90-day review period when it learned of the new New York rates, and has had ample time to respond to several complaints regarding switching and hot cuts, but has not done so to date. Verizon-NJ as of the 81st day of the 90-day review period has declined to lower its switching and hot rates in New Jersey even though it voluntarily lowered those rates in Rhode Island on the 80th day of the 90 day review period. TELRIC compliant switching and hot cut rates are essential to Verizon-NJ’s compliance with checklist item 2, as well as central to meaningful local exchange competition in New Jersey.

Neither the Board nor interested parties have had the opportunity to consider the new New York rates and Verizon’s voluntary reduction in the hot cut rate in New York and whether these rates raise questions concerning whether the methodology to set rates in New Jersey are consistent with TELRIC principles. This is the opposite of what occurred in Rhode Island.

III. CONCLUSION

The Ratepayer Advocate recommends that Verizon-NJ's Section 271 filing be dismissed as not complete-as-filed at this time. Further, the Ratepayer Advocate urges the Commission to issue another Public Notice, in addition to the Public Notice to which these instant comments respond, in order to to assess the effect of the New York rates on the New Jersey filing, and whether further rate reductions are required.⁴⁰ The Ratepayer Advocate urges the Commission to heed the admonitions of Commissioner Copps and Commissioner Martin, as reflected in their statements issued in the *Rhode Island Order*, and that the Commission enforce its complete-as-filed rule in future proceedings.⁴¹

The facts show conclusively that Verizon-NJ's application is wholly insufficient and cannot be granted. Verizon-NJ has failed to show good cause and any special circumstance that would warrant waiver of its complete-as-filed rule. Without such a waiver, the FCC may not consider the additional evidence offered and the evidence that does exist at the time of filing does not demonstrate compliance with checklist item 2. As discussed previously, the evidence that existed when Verizon-NJ filed its Application with the Commission demonstrates that a substantial number of the UNE rates were not TELRIC compliant. Therefore, Verizon-NJ in no way could have satisfied checklist Item 2 at the time of filing, and the Application could not have been, and simply was not, complete when filed.

⁴⁰/ In the event that Verizon-NJ does offer a voluntary reduction, such an offer would require re-starting the 90 day review period or in the alternative, it should extend the effective date of any order approving the application consistent with the action taken in prior Section 271 orders.

⁴¹/ *Rhode Island Order*, Separate Statements of Commissioner Michael J. Copps, at 2, and Commissioner Kevin J. Martin, at 1, 2.

Accordingly, the Ratepayer Advocate respectfully submits that any action other than dismissal of the application or the restarting of the 90-day clock under the circumstances here would be contrary to the public interest and is legally deficient. The Ratepayer Advocate accordingly respectfully requests the Commission to enforce its complete-as-filed rule, and to restart the 90-day review period for the Verizon-NJ Section 271 Application.

Respectfully submitted,

Seema M. Singh, Esq.
Acting Director and Ratepayer Advocate

By: s/ Lawanda R. Gilbert

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Attachment A

Date	Document	Switch Rates	Hot Cut Rates	Benchmarking	USF Analysis	Other
1/30/02	Letter from Meadowlands Regional Chamber of Commerce: general support of application					X
1/31/02	Letter from Blossom Peretz, RPA: handouts from meeting					X
2/4/02	Letter from Amy Alvarez, AT&T: telephone conversation			X		
2/13/02	Letter from Clint Odom, Verizon: handouts from meeting	X				
2/13/02	Letter from Clint Odom, Verizon: handouts from meeting		X	X		
2/19/02	Letter from Clint Odom, Verizon: info. re: testing of line splitting					X
2/19/02	Letter from Clint Odom, Verizon: f/u on meeting re: Verizon's <i>force majeure</i> policy					X
2/20/02	Letter from Clint Odom, Verizon: response to claims made by parties	X	X	X	⁴²	
2/25/02	Letter from Clint Odom, Verizon: response to requests from staff for					X

⁴²Not USF analysis specifically, but does discuss TELRIC compliant rates.

Date	Document	Switch Rates	Hot Cut Rates	Benchmarking	USF Analysis	Other
	info. regarding OSS in NJ					
2/25/02	Letter from Clint Odom, Verizon: response to MetTel claims on OSS					X
2/25/02	Letter from Clint Odom, Verizon: response to staff requests for OSS information					X
2/25/02	Letter from Clint Odom, Verizon: response to staff request for clarifying info. on issues raised by ATX					X
2/27/02	Letter from Amy Alvarez. AT&T: notice of meeting					X
2/27/02	Letter from Clint Odom, Verizon: response to request for info from staff on orders that flow through NJ and PA			X		
2/28/02	Letter from Clint Odom, Verizon: rate elements applied under NY UNE and NJ UNE rates	X		X		
3/1/02	Letter from Clint Odom, Verizon: provides carrier-to-carrier summary, trend and CLEC aggregate reports for 1/02 for NJ					X
3/1/02	Letter from Clint Odom, Verizon: maintenance and repair performance in NJ, forwards NJ					X

Date	Document	Switch Rates	Hot Cut Rates	Benchmarking	USF Analysis	Other
	UNE Specials ad hoc reports revised to include z scores (not attached to my copy)					
3/1/02	Letter from Clint Odom, Verizon: NJ Data Revisions					X
3/1/02	Submission from Robert Quinn, AT&T: responds to arguments on issues of hot cut NRCs and “price squeezes”.		X	X	⁴³	
3/5/02	Letter from Robert Quinn, AT&T: Supplement to 3/1/02 submission.					X
3/5/02	Letter from Robert Quinn, AT&T: Supplement to 3/1/02 submission, hot cut NRCs		X			
3/5/02	Letter from Amy Alvarez, AT&T: meeting re: pricing concerns and OSS deficiencies.					X
3/6/02	Letter from Robert Lopardo, Worldcom: confirming phone conversation about Verizon’s non-TELRIC switching rates in NJ	X				
3/6/02	Letter from Clint Odom, Verizon: answers to staff questions					X

⁴³Discusses TELRIC compliance but no specific mention of USF Analysis.

Date	Document	Switch Rates	Hot Cut Rates	Benchmarking	USF Analysis	Other
3/6/02	Letter from Robert Quinn, AT&T: costs of local entry					X
3/6/02	Letter from Michael Pryor and Lisa Anderson, Mintz, Levin, et al. on behalf of ATX: update on continuing billing issues w/Verizon and response to Verizon's <i>ex parte</i> filing on access to UNE-P products					X
3/7/02	Letter from Eugene Provost, DAG: filing Order of NJBPU in UNE Proceeding					X
3/8/02	Letter from Clint Odom, Verizon: Erratum-unbundled common transport per mile rate for NJ					X
3/8/02	Letter from Clint Odom, Verizon: response to AT&T criticism of non-recurring hotcut rates		X			
3/11/02	Letter from Amy Alvarez, AT&T: confirm meeting of 3/7/02 re: pricing concerns and OSS deficiencies					X
3/11/02	Letter from Richard Ellis, Verizon: confirm meeting re: pricing issues related to switching and DUF rates					X
3/11/02	Letter from Amy Alvarez, AT&T: confirm meeting of 3/8/02 re: concerns w/Verizon's NRC for hot					X

Date	Document	Switch Rates	Hot Cut Rates	Benchmarking	USF Analysis	Other
	cuts and deficiencies of Verizon's OSS in NJ					
3/11/02	Letter from Richard Ellis, Verizon: response to staff request for documents re: unbundled end office switching usage	X				
3/12/02	Letter from Clint Odom, Verizon: explanation of how "additional" non-recurring rates for hotcuts operate in NJ		X			
3/12/02	Letter from Clint Odom, Verizon: CLEC-aggregate flow through data					X
3/12/02	Letter from Clint Odom, Verizon: confirm meeting to discuss application					X

VOLUME 8

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

NEWARK, NEW JERSEY

THURSDAY, DEC. 21, 2000

IN THE MATTER OF THE BOARD'S :
REVIEW OF THE UNBUNDLED NETWORK: DOCKET NO.
ELEMENT RATES, TERMS AND : TO-00060356
CONDITIONS OF VERIZON-NEW :
JERSEY, INC. :
-----:

B E F O R E: COMMISSIONER FREDERICK F. BUTLER

A P P E A R A N C E S:

On behalf of Verizon-New Jersey, Inc., appear:

WILENTZ, GOLDMAN & SPITZER, ESQS.
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On behalf of the Division of the Ratepayer Advocate,
appears:

CHRISTOPHER WHITE, ESQ.
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A Riolo: But I don't know, but again, the standards that - - that fall within the scope of ONA deal with a whole host of issue. You know, NEBS 3 compliance deals with the amount of heat generated. As an example, there are types of anchors that must use in anchoring the equipment to the floors to make sure that it withstands certain earthquake zones. So, you know, California will have a number 4 type of standard, and in New York maybe a three and it's only because California is a lot more shaky than New York in tying down equipment basically, but there is a host of various items that are looked at from an engineering perspective.

Q Right.

This I will direct to Ms. Murray, and this relates to page 74 where you talk about you propose some 50 percent reduction in certain charges?

A Murray: Yes.

Q And part of that is based upon your belief that the estimates were not proper, is that correct?

A That is correct.

Q How would you normally validate an estimate as opposed to doing something like a cost tracking study, a time in motion study or actually auditing service orders?

A Murray: Well, what we - - what we have done here and in trying to validate an estimate is to apply a simple common sense standard. The common sense standard is we will take four purposes of this estimate as given that the collocation application fee is properly cost based for a full collo installation now that - - that in and of itself may be an incorrect assumption, and I am certainly not endorsing that fee, but simply taking that fee as being cost based, say all right, now logically how much less cost would there be, if any, for this task of a collocation augmentation application, and in order to validate that, I went to Mr. Riolo as an expert, and I have also spoken with Mr. John Donovan about this and said what's entailed in the two activities, how much difference is it?

We also looked at some evidence that came forward in New York about the discrepant nature of the applications themselves

for the two activities and the augment application suggestively is a much, much skinnier document than the original collo application suggesting the process of the application would similarly be much less complex. So in this case, looking at the ability to do a time in motion study or any of the other kinds of studies that you suggest and lacking any of - - any evidence from Verizon, any cost evidence to support the charge, we simply apply that kind of common sense standard and said, gee, if the charge is right for the whole application, it must be too high for the augment.

Panel - cross

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Q But are you saying that it's really not possible to validate an estimate reliably?

A Murray: It's very difficult, and here we're not even trying to validate an estimate.

I mean, we weren't given an estimate. We were just told we're using this number, a charge for another activity that's somewhat related as a proxy for a cost based charge for the activity that we're going to charge you for.

So we're not even trying to validate an estimate. We don't have an estimate.

There is no cost study.

Q You said you reviewed this, this data was derived from New York and Boston, correct, these estimates?

A Murray: The data about collocation augments that was available to us was derived from other jurisdictions because in this jurisdiction we were not even given that much information.

Q Did you review these estimates in this proceeding or did you review this in another proceeding you participated in?

Panel - cross

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A Murray: The estimates we reviewed, and they were publicly available in those other proceedings, so we brought them into this docket as a means of supplementing the record since Verizon-New Jersey, for whatever reasons, chose not to make any record on the cost basis for this charge.

Q But these estimates are all part of their footprint analysis they do to estimate non-recurring charge times that they've used in other proceedings, correct?

That's your understanding?

A Murray: That is my understanding with respect to collocation. In general, Verizon studies tend to be relatively cookie cutter studies across the entire footprint, and understandably so.

There are a lot of similarities that one would expect in non-recurring costs. They are basically lists of tasks and task times and frequencies of occurrence.

Q But to the extent they are in fact across the whole footprint and you're using an average, use of an average can result in an

Panel - cross

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average price, but then that means that in some states that are better than the average they're overpaying and people that are worse than the average or not as efficient are basically getting it cheaper than they should have. Isn't that one of the problems inherent with averages when you use it to base rates on?

A Murray: Yes, with the following qualification.

The way you phrased your question is talking about, it sounded like you were talking about existing levels of efficiency, and it is my testimony that none of the charges should be based on existing levels of efficiency but rather forward looking ways of performing the activities where I would expect the times to converge more, because if everyone were to employ best practices, you would get more similarity.

Having said that, I do agree that there are still state to state differences that can occur. For example, just because Central Offices in one state might be larger than in another, you have a different mix of office size and the activities are more or less complex or

Panel - cross 1961
time consuming because of that.

So there are trade-offs even in the forward-looking study, but I would expect best practices to converge the estimate somewhat.

Q So your basic concern is that these estimates really aren't forward-looking, and if they were forward-looking, some of these discrepancies and outliers would be closer and you base that assumption based upon your analysis of this, I believe you said of a median and comparing that to what I call the average?

A Murray: In the case of the non-recurring cost estimates that Ms. Babineau cross examined me about, that is one of my concerns, these extreme outliers that do not appear to reflect the application of best practices.

Q You're an economist, right, or have you been trained as an economist?

A Murray: Yes.

That's a horrible admission to ask someone to make.

Q It's not as bad as to say you were trained as a lawyer.

COMMISSIONER BUTLER: Those are

Pertinent Excerpt from Hearing Exhibit RPA-12

VERIZON NEW JERSEY INC.
BPU DOCKET NO. TO00060356
DRA REQUEST #DRA-62
WITNESS: MEACHAM
PAGE 1 OF 1

REQUEST: Provide any Tone studies done on RCCC coordinators which show the times necessary to perform the functions associated with these coordinators.

RESPONSE: No such studies have been performed.

VERIZON NEW JERSEY INC.
BPU DOCKET NO. TO00060356
DRA REQUEST #DRA-63
WITNESS: MEACHAM
PAGE 1 OF 1

REQUEST: Provide any cost tracking studies performed based upon actual work orders performed by Verizon in support of its cost studies. Provide any cost tracking studies done by Verizon for the period 1990 through 1999.

RESPONSE: Verizon NJ objects because the question is unclear. To the extent Verizon NJ understands the question it responds as follow: No such “cost tracking studies” have been performed.